No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NEW JERSEY PEACE ACTION; PAULA ROGOVIN; ANNA BERLINRUT; WILLIAM JOSEPH WHEELER,

Petitioners,

—v.—

BARACK H. OBAMA, President of the United States, in his official capacity,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether the Court of Appeals erred in dismissing Plaintiffs' petition for a Declaratory Judgment concerning the meaning of Article I, Section 8, Clause 11 of the Constitution on the ground that the President would be likely to ignore such a declaration?

2. Does the Judiciary Have the Power to Effectuate the Procedural Requirements of the Declare War Clause of the Constitution?

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OPINIONS BELOW

On May 10, 2010, the Court of Appeals for the Third Circuit affirmed the decision of the United States District Court for the District of New Jersey. (App. at 1a.) The Circuit opinion is unreported (*Id.*), as is the opinion of the lower court (*Id.* at 14a).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Third Circuit's opinion was rendered on May 10, 2010. (*Id.* at 1a-2a.) The Petition for Rehearing and Rehearing En Banc was denied on July 7, 2010. (*Id.* at 37a-38a.) On September 24, 2010, Justice Alito granted the Petitioners an extension of time within which to file a petition for a writ of certiorari to and including November 4, 2010.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I Section 8.

> The Congress shall have power . . . To declare War, grant Letters of Mark and Reprisal, and make Rules concerning Captures on Land and Water.

Authorization for Use of Military Force Against Iraq Resolution of 2002, §3 (a), H.J. Res. 114, 107th Congress (2d Sess. 2002)

> The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to –
>
> 1) defend the national security of the United States against the continuing threat posed by Iraq; and
> 2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

STATEMENT OF THE CASE

On October 16, 2002, Congress gave President Bush the power to decide in his discretion to use military force against Iraq. Authorization for use of Military Force Against Iraq Resolution of 2002, H.J. Res. 114, 107th Congress (2d Sess. 2002). The words used – Authorization for Use of Military Force ("AUMF") – had their origin in 1955 during the Formosa Straits incident (1955) and have been used in the Middle East (1957), Vietnam (1964), Lebanon (1983), Iraq (1991), worldwide after the 9-11 attack (2001), and Iraq (2002).[1] But never before had an AUMF been

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[1] *See* DAVID ACKERMAN & RICHARD GRIMMETT, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL

used to authorize the President to invade a sovereign nation without clear provocation. In March 2003, the President ordered the invasion of Iraq, a nation that had not attacked the United States or any State, nor attempted an invasion or encouraged insurrection or rebellion within the United States.

In 2008, Plaintiffs commenced this action seeking a Declaratory Judgment that the AUMF against Iraq violated Article I, Section 8, Clause 11 of the U.S. Constitution. The Plaintiffs are New Jersey Peace Action, a 50-year-old non-profit advocacy organization working for peace and nuclear disarmament; William Joseph Wheeler, an Iraq war veteran who had been separated from the Army for medical reasons but was subject to recall at the time of filing of the Complaint; and two mothers, Paula Rogovin and Anna Berliner, of soldiers who had served tours of duty in Iraq.

The District Court dismissed the action on two grounds: lack of standing on the part of any plaintiff, and the political question doctrine. (App. at 35a-36a.)[2] The May 10, 2010 panel opinion, acting within its jurisdiction under 28 U.S.C. § 1291, affirmed the District Court without oral argument on the ground that none of the plaintiffs could demonstrate an injury that could be

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[2] The Third Circuit panel opinion found it unnecessary to address the issue of "political question." (App. at 10a n.5.)

redressed by judicial action, and that a Declaratory Judgment would be meaningless because the President and Congress would ignore it. (App. at 11a–13a.) A Petition for Rehearing *en banc* was dismissed by the Circuit on July 7, 2010. (App. at 37a–38a.)

Plaintiffs' Amended Complaint set forth in great detail the record of the Constitutional Convention and the debate over the Declare War Clause and its historical background. (App. at 41a-65a.) That history showed that on June 1, 1787, the Convention overtly rejected proposals that the President could, directly or indirectly, be given the power to take the nation to war. The Convention placed that power in the hands of Congress, the people's representatives. (App. at 53a ¶31.) That history was acknowledged by the U.S. Supreme Court during the Nineteenth Century. *See Bas v. Tingy*, 4 U.S. 37, 43, 1 L. Ed. 731, 734 (1800) ("Congress is empowered to declare a general war, or Congress may wage a limited war, limited in place, objects and time."); *Talbot v. Seeman*, 5 U.S. 1, 28, 2 L. Ed. 15, 24 (1801) (Marshall, C. J.) ("The whole powers of war, being by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this enquiry."); *The Prize Cases*, 67 U.S. 635, 668, 17 L. Ed. 459, 477 (1863) ("By the Constitution, Congress alone has the power to declare a national or foreign war.") No federal appellate court has ever examined the records of the Constitutional

Convention from June 1, with respect to the war powers of Congress.[3]

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[3] On May 29, 1787, the first working day of the Constitutional Convention, Virginia's Governor Randolph proposed a 15 point plan that structured the early debate. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. I, 20-23 (Yale University Press, 1911) (hereinafter "1 Farrand"). Before June 1, the Convention adopted a three-part government including a two-house legislature where the first branch was to be elected by the people. *Id.* at 45-47. On June 1, delegates considered the powers of the executive branch. There was no discussion about whether the executive should have the power to "carry into execution the national laws." *Id.* at 62-63. But the additional phrase – "it ought to enjoy the executive rights vested in Congress by the Confederation" – was immediately challenged by Charles Pinckney (South Carolina) who was afraid such "executive rights" would extend to "peace and war which would render the Executive a Monarchy of the worst kind, to wit an elective one." Pinckney was joined by three other delegates (Sherman of Connecticut, Wilson of Pennsylvania, and Rutledge of South Carolina) in criticizing the proposal. *Id.* at 63-66.

Historian Joseph Ellis explained the public attitude behind Pinckney's concern:

> At the very core of the revolutionary legacy . . . was a virulent hatred of monarchy and an inveterate suspicion of any consolidated version of political authority. A major tenet of the American Revolution – Jefferson had given it lyrical expression in the Declaration of Independence – was that all kings, and not just George III, were inherently evil. The very notion of a republican king was a repudiation of the spirit of '76 and a contradiction in terms.

JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 127-28 (Alfred A. Knopf, ed. Borzoi Books, 2005) (2001).

If the Circuit Court was correct that the President and Congress would ignore a Declaration by a lower federal court (App. at 11a), there is all the more reason why this Court should hear this case. Certainly, the President and Congress would not ignore a decision by the Supreme Court. Indeed, since World War II, lower federal courts have consistently refused to hear challenges to presidential exercises of war powers on various procedural grounds without review by this Court. *See e.g., Luftig v. McNamara*, 373 F.2d 664 (D.C.

On June 1, 1787, the Convention rejected the proposal that the President could, either directly or indirectly, be given the power to take the nation to war, placing it in the hands of Congress. 1 Farrand at 67. The judgment of June 1 was supported on August 6 by a Committee on Detail that provided Congress with the power to "make war." THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. II, 181-82 (Yale University Press, 1966) (hereinafter "2 Farrand"). On August 17, "Make war" was modified to "declare war" expressly to allow presidents to "repel sudden attacks." *Id.* at 318. That change did not provide the president with independent authority to take the nation to war. The Convention, beginning on August 18, allowed Congress to authorize presidential hostilities only in the situations of invasion, insurrection, failure of federal law, and to protect states in similar situations. *See e.g.*, U.S. Const., Art. I, §8, Cl. 15; U.S. Const., Art. IV, §4. The limitation to those specific situations assured that presidential authority would not overstep that of Congress. *See id; see also Marbury v. Madison*, 5 U.S. 137, 175, 2 L. Ed. 60, 72 (1803) ("Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.").

Cir. 1967), *cert. denied*, 387 U.S. 945 (1967); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Myers v. Nixon*, 339 F. Supp. 1388 (S.D.N.Y. 1972); *Dellums v. Bush*, 752 F.Supp. 1141 (D.D.C. 1999). The exception is one summary affirmance of a three-judge district court's dismissal of a challenge to the Vietnam War on "political question" grounds. *Attlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub. nom. Attlee v. Richardson*, 411 U. S. 911, 93 S. Ct. 1545; 36 L. Ed. 2d 304 (1973) (with three Justices voting to note probable jurisdiction.) It is time for this Court to step up and finally determine whether Americans are entitled to compel the presidency to defend in a court of law its expansive interpretation of the Constitution's Declare War Clause. *Marbury*, 5 U.S. 137.

REASONS FOR GRANTING THE PETITION

Introduction

The District Court granted the Defendant's motion to dismiss for failure to state a claim on grounds both of lack of standing and political question. (App. at 35a-36a.) The Court of Appeals affirmed for lack of standing, asserting that even if Plaintiffs could show injury in fact and causation, the relief sought (a Declaratory Judgment) would not redress their alleged injuries. (*Id.* at 9a-10a.) The Circuit found it unnecessary to address the issue of political question. (App. at 10a n.5.)

Neither of the courts below addressed the substantive constitutional issue presented by

Plaintiffs – the constitutionality of President Bush's decision to invade the sovereign nation of Iraq absent a declaration of war by Congress as required by Article I, Section 8, Clause 11 of the United States Constitution. Nevertheless, Petitioners respectfully submit that the issues of standing and redressability can be adequately addressed only through the prism of constitutional history demonstrating the Framers' intention to require a separation of powers over war between Congress and the President as reflected in the records of the Constitutional Convention of 1787 and to empower the People to enforce that separation. The record of June 1, 1787, has never been discussed in any Court of Appeals opinion, and has only been identified in *Orlando v. Laird*, 317 F. Supp. 1013 (E.D. N.Y. 1970). In *Orlando*, District Court Judge Dooling wrote:

> Neither the language of the Constitution nor the debates of the time leave any doubt that the power to declare war was pointedly denied to the presidency. In no real sense was there even an exception for emergency action and certainly not for self-defined emergency power in the presidency. The debates, so often strangely -- to our ears -- devoid of respect for and alive with fears of the presidency that the Convention was forming, are clear in the view that [ ] the power to make war and peace are legislative. [2 Farrand at 65, 73.]

Id. at 1016. Despite his finding, Judge Dooling ruled that Congress' continued funding of the war in Vietnam constituted the equivalent of a declaration of war (*id.* at 1019-20), a determination that the Court of Appeals affirmed. 443 F.2d 1039, 1044 (2d Cir. N.Y. 1971).

I. THE COURT OF APPEALS ERRONEOUSLY ASSUMED THAT THE PRESIDENT AND CONGRESS WOULD IGNORE A JUDICIAL DECLARATION INTERPRETING ARTICLE I, SECTION 8, CLAUSE 11 OF THE CONSTITUTION AND THUS COULD PROVIDE NO REDRESS FOR PETITIONERS' INJURIES.

The Third Circuit held that Petitioners failed to satisfy the redressability prong of the standing requirement as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351, 364 (1992). The Court determined that even if Petitioners met the injury in fact and causation requirements of standing, a Declaratory Judgment ruling that the President violated Article I, Section 8, Clause 11 of the Constitution by ordering the invasion of the sovereign nation of Iraq without a Congressional Declaration of War would not provide redress for those injuries. (App. at 11a.) The Court stated that a judicial declaration would have no "practical effect on the President and Congress in the face of any future [ ] military conflict," (*id.*) nor "inform any future actions by the President and Congress." (*Id.* at 13a.) The Circuit Court cited no authority

for this conclusion and there is none. If the Court of Appeals meant that the President might ignore a declaration from a lower federal court, that is all the more reason why this Court should intervene.

As this Court declared some 200 years ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177. And most recently, in *Boumedienne v. Bush*, the Court re-confirmed the validity and power that a judicial declaration has to dictate how the President views the rights of the prisoners at Guantanamo when it stated: "We have no reason to believe an order from a federal court would be disobeyed at Guantanamo." 553 U.S. 723, 751, 128 S. Ct. 2229, 2251, 171 L. Ed. 2d 41, 68 (2008).

History has repeatedly shown this to be true. Although President Eisenhower did not privately endorse school desegregation after *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) was decided, the President enforced the Court's decree by sending troops to Topeka, Kansas, stating: "The Supreme Court has spoken, and I am sworn to uphold their – the constitutional processes in this country, and I am trying. I will obey." CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 126 (2004). Similarly, in *Cooper v. Aaron*, the Supreme Court affirmed the power of the courts to compel the nation to follow its judicial decree in *Brown* and decreed that local officials had a duty to obey a federal court order "resting on this Court's

considered interpretation of the United States Constitution." 358 U.S. 1, 4, 78 S. Ct. 1401, 1403, 3 L. Ed. 2d 5, 9 (1958). The Court stated that: "Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, 'to support this Constitution.'" 358 U.S. at 18.

Also, in *Youngstown Sheet & Tube Co. v. Sawyer*, after the President issued an order to take possession of most of the nation's steel mills to prevent labor disputes from halting production, the Court ordered that the President return the private property because the Constitution did not authorize the President to have this power. 343 U.S. 579, 586, 72 S. Ct. 863, 866, 96 L. Ed. 1153, 1167 (1952). The Court stated:

> The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.[4]

343 U.S. at 589. Immediately following the Court decision, the President ordered Secretary Charles Sawyer to return the steel mills. William H.

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[4] Similarly, in *Little v. Barreme*, the Court held that the President lacked the power to seize a vessel bound from a French port because the "act of Congress appear[ed] to have received a different construction from the executive of the United States . . . ." 6 U.S. 170, 178, 2 L. Ed. 243, 246 (1804).

Harbaugh, *The Steel Seizure Reconsidered*, 87 Yale L. J. 1272, 1275 (1978).

Likewise, a decision declaring the right of Congress only to Declare War will be accepted by future presidents as decided by the Court.

Moreover, the Court of Appeals erred when it stated that: "it is 'merely speculative' that any psychic benefits of declaratory relief would redress the 'emotional, physical[,] and psychological injur[ies]' already suffered by the plaintiffs in this case." (App. at 10a-11a.) According to 28 U.S.C. § 2201, a declaratory judgment is a form of redress that was created to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Professor Borchard, the father of the Declaratory Judgment Act, stated that "a court exerts a certain amount of judgment or discretion in determining whether a plaintiff or defendant has a legal interest in contesting the validity of a statute or administrative ruling. . . . [S]uch an interest . . . will be more readily perceived when large public interests are at stake." DECLARATORY JUDGMENTS 32 (Banks-Baldwin Law Publishing Co., 2d ed. 1941).

The President used the Authorization for Use of Military Force Against Iraq Resolution of 2002 ("AUMF") to launch a war against Iraq without a clear Declaration of War from Congress. A declaratory judgment will remedy the harms the Petitioners have suffered by declaring their rights as advocates of the original understanding of the United States Constitution to know if the

Presidency is violating Article I, Section 8, Clause 11 by continuing to use AUMFs without a Declaration of War from Congress.[5] Only a judicial decree can ensure future compliance by the Presidency and Congress with the Constitutionally required procedure for declaring war.[6]

Only a decision by this Court can provide "The People of the United States" with a definitive declaration of the original intention of the Framers with regard to the Declare War Clause. It cannot seriously be denied that a decision by this Court declaring the procedures that must be followed before the President orders the invasion of a sovereign nation without clear provocation would affect all future debates regarding issues of war and peace.

Further, advocates of the original understanding of the Constitution, including the Petitioners, will be given a concrete legal ruling

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5 In *Larson v. Valente*, the Court stated that "appellees will be given substantial and meaningful relief by a favorable decision of this Court" if a declaratory judgment is granted declaring the act unconstitutional. 456 U.S. 228, 243, 102 S. Ct. 1673, 1682, 72 L. Ed. 2d 33, 47 (1982).

6 Although clarification will not have stopped the Iraq War, or cured the emotional and physical injuries the Plaintiffs' received, clarification in the form of a judicial declaration will offer Petitioners' closure and finality, which is an invaluable form of redress. The Court has consistently emphasized that the public has a strong interest in finality in its cases. *See Cardinal Chem Co. v. Morton Int'l*, 508 U.S. 83, 100, 113 S. Ct. 1967, 1977, 124 L. Ed. 2d 1, 17 (1993); *Horne v. Flores*, 129 S. Ct. 2579, 2596, 174 L. Ed. 2d 406, 423 (2009).

that will enable them to enforce the Constitution's procedural requirements for declaring war. This Court's rulings have historically aided those who have worked to protect and safeguard the integrity of the U.S. Constitution.

For example, although the ruling in *Brown*, 347 U.S. 483, did little in and of itself to end racial animosity among Americans, this Court's decision motivated and empowered civil rights groups to continue to fight for racial equality and desegregation in the face of huge societal obstacles.[7] Similarly, *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), a case providing juveniles with the due process rights to an attorney, notice, confrontation, cross-examination, and a transcript, "energized children's advocates in the 1970s to challenge the squalid conditions of confinement prevalent in many of the nation's secure juvenile correctional institutions."[8]

Thus, the Court of Appeals committed plain error when it held that a judicial declaration proclaiming that the presidency violates the Constitution when it initiates a war without a Congressional Declaration of War would be ignored by the President and Congress and therefore would

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[7] *See* Michael R. Kuffner, *From Public Schools to Public Libraries: Examining the Impact of Brown v. Board of Education on the Desegregation of Public Libraries*, 59 Ala. L. Rev. 1247, 1251-52 (2008).

[8] See Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 Or. L. Rev. 1001, 1007-08 (2005).

not be able to provide any redress of the Petitioners' injuries. This Court should grant review in order to correct that plain error. It is certain that this Court's declaration will not be ignored.

II. PETITIONERS HAVE STANDING TO INVOKE THE POWER OF THE JUDICIARY TO EFFECTUATE THE PROCEDURAL REQUIREMENTS OF THE DECLARE WAR CLAUSE OF THE CONSTITUTION

The Founders and the People who ratified the Constitution intended to protect exactly the interests asserted by Petitioners when they gave Congress the exclusive power to declare war in Article I. Thomas Jefferson said it best: "[Article I, Section 8, Clause 11 provides] an effectual check to the Dog of War by transferring the power of letting it loose from Executive to Legislative body, from those who are to spend to those who are to pay." THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON, 397 (Julius P. Boyd, ed.) (1955).

Petitioners are asking the courts to issue a Declaratory Judgment stating that the separation of powers established by the Constitution is real and that the procedural requirements of the Declare War clause must be adhered to before the President can invade a sovereign nation that has not attacked the United States. Petitioners seek a declaration that the requirement that only Congress can "Declare War" is not a merely

theoretical construct that may be evaded at will. In other words, "those who are to pay" for the war are here asking the Court whether the Constitution actually provides the "effectual check to the Dog of War" that the Founders intended.

Petitioners are among those who actually fought and paid for the War in Iraq. Therefore injury-in-fact and causation requirements of Article III standing doctrine should be assumed.[9] Accordingly, Petitioners are appropriate representatives of the "People of the United States," who are both the creators of the Constitution and the intended beneficiaries of its fundamental limitations on the power to declare war.

The Founders certainly intended that the Declaration of War requirements of the Constitution would be respected and enforced. As Alexander Hamilton wrote:

> There is no position that depends on clearer principles, than that every act

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[9] While all of the Petitioners have alleged taxpayer and other factual bases for standing, the injuries alleged by Wheeler, Rogovin and Berlinrut, in particular, will demonstrate that Petitioners have more than a generalized grievance. "[N]o major war in our history has been fought with a smaller percentage of this country's citizens in uniform full-time [than Iraq] – roughly 2.4 million active and reserve service members out of a country of over 300 million, less than one percent." Robert M. Gates, *Lecture at Duke University (All-Volunteer Force)*, Dept. of Defense (Sept. 29, 2010), http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1508.

> of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. . . . To deny this would be to affirm that the deputy is greater than his principal; . . . that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

The Federalist No. 78. The debate at the Conventions drafting and ratifying the new Constitution often stressed the power of the courts to insure that neither Congress nor the Executive would usurp, or exercise power beyond that granted by the Constitution.

> If Congress exceeds its powers, said George Nicholas in the Virginia Convention, "the judiciary will declare it void." [JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY GENERAL CONVENTION AT PHILADELPHIA IN 1787, VOL. III, 443 (1866).] Samuel Adams said in the Massachusetts convention that "any law . . . beyond the power granted by the proposed constitution . . . [will be] adjudged by the courts of law to be void." 2 [*id.*] 131. Oliver Ellsworth told the Connecticut

> convention that "a law which the Constitution does not authorize" is void, and the judges "will declare it to be void." 2 [*id.*] 196. Similar statements were made by Wilson in Pennsylvania, 2 [*id.*] 446, and by John Marshall in Virginia, 3 [*id.*] 553.

Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 Yale L. J. 816, 834 n.94 (1968-69).

While much of the original debate was framed in terms of the courts' ability to restrain congressional action, *Marbury* made it plain that the courts' power extended equally to executive acts and that such power was "deemed fundamental" to a constitutional system. 5 U.S. at 176. As Justice Marshall wrote:

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it . . . [I]f the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Id. at 176-77.

The history of the Constitutional Convention makes it clear that the Constitution's procedural requirements for declaring war are among "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772, 788 (1997) (Rehnquist, C.J.) (internal citations omitted). *See* n.2, *supra*. Thus, the Judiciary, and this Court in particular, necessarily has the power *and the duty* to effectuate the procedural requirement that only Congress can "Declare War" when the Executive disregards it. There is simply no other way in which these fundamental rights can be enforced.

Plaintiffs' core claim is that they have standing to seek a Declaratory Judgment because they are among "the People of the United States, [who] in Order to form a more perfect Union" established a constitution that imposed explicit procedural requirements that must be followed before the Nation's lives and treasure are expended to attack a sovereign foreign power and they are among those who suffered injury because President Bush violated of those requirements. *See Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 526 n.24, 127 S. Ct. 1438, 1458 n.24, 167 L. Ed. 2d 248, 273 (2007) (quoting *United States v. Students Challenging Regulatory Agency Proceedings (SCRAP)*, 412 U.S. 669, 687-88, 93 S. Ct. 2405,

2416, 37 L.Ed. 2d 254, 270 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody").

The question presented by the Petitioners is not the political one of whether it was a good idea or a bad idea to invade Iraq. Rather, the question is what procedures must the Nation follow before war is declared. Article I, Section 8, Clause 11 unambiguously answers the question: "Congress shall have the power . . . to Declare War."

Surely, someone must have standing to seek judicial enforcement of such an unambiguous Constitutional provision. If not these Petitioners, who? If not now, when? Cf. Rabbi Hillel, *Pirkei Avot* 1:14.

Admittedly, the redress that Petitioners are capable of obtaining is limited and imperfect. The Iraq War cannot be undone. Constitutional standing, however, does not require perfect redress. *See Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 769 n.2, 105 S. Ct. 2939, 2950 n.2, 86 L. Ed. 2d 593, 609 n.2 (1985). It is sufficient that there is *some* redress that a court can provide - something that is certainly possible in the present case. A Declaratory Judgment in favor of Plaintiffs can return our nation to the original intention of Article I, Section 8, Clause 11.

A decree that the President must abide by the requirement that only Congress may Declare War will re-enable the Declare War Clause to serve

its original intent of providing "an effectual check to the Dog of War by transferring the power of letting it loose from Executive to Legislative body, from those who are to spend to those who are to pay." *See* THE PAPERS OF THOMAS JEFFERSON, *supra*.[10]

Unstated in the lower courts' decisions, but implicit in their reasoning, is the radical proposition that absolutely no one has standing to bring the question raised by this case at any time. Similarly, unstated is the proposition that only Congress can enforce its Article I duties, and that if Congress chooses to abdicate those duties, then the People have no recourse, since none among them

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[10] James Wilson of Pennsylvania, speaking to that state's ratifying convention, similarly emphasized the importance of Congress declaring war:

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the house of representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

Jonathan Elliot, *The Debates In the Convention of the State Of Pennsylvania, On The Adoption Of The Federal Constitution*, in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, Vol. II*, 528, http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field (DOCID+@lit(ed0028)) (last visited Oct. 31, 2010).

can ever satisfy the pinched notions of standing that the lower courts adopted.[11]

This plainly is not the law the Founders intended. The Founders recognized that the power to declare war upon a foreign sovereign nation is the most fearsome power held by the United States. The Founders feared that power, and with good reason. War sets aside all ordinary notions of law and instead unleashes death and destruction upon every nation and person involved on a scale that is said to be unimaginable to those who have not directly experienced it. The Founders, "We, the People of the United States," those who tried their best to "form a more perfect union, establish Justice, insure domestic tranquility . . . and secure the Blessings of Liberty to ourselves and to our posterity," surely meant it when they wrote that *only Congress* has the power "To Declare War."

Accordingly, the Founders could never have intended to deprive the courts of the power to declare the meaning of that clause due to twisted theories of standing that make it impossible for anybody to prosecute a judicial challenge to that fearsome power. This Court can redress that injury to the Founders' intention by recognizing Petitioners' standing and by remanding this case to be heard and decided on its merits.

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[11] To this effect, see *John Doe I v. Bush*, 322 F.3d 109, (1st Cir. 2003); *Massachusetts v. Laird*, 451 F.2d 26, 33 (1st Cir. 1971).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant review in this matter.

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Counsel for Petitioners gratefully acknowledge the assistance of students enrolled in the Rutgers Constitutional Litigation Clinic for their assistance in the preparation of this petition: Julien Baumrin, Yael Bromberg and Kelly Levy. We also acknowledge the assistance of Professor Emeritus Alfred Blumrosen and Steven Blumrosen for their guidance on the history of the Constitutional Convention.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2781

NEW JERSEY PEACE ACTION; PAULA ROGOVIN; ANNA BERLINRUT; WILLLIAM JOSEPH WHEELER,

Appellants

v.

BARACK H. OBAMA, President of the United States in his Official Capacity,
(Pursuant to F.R.A.P. 43(c))

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2-08-cv-02315)
District Judge: Honorable Jose L. Linares

Submitted Under Third Circuit LAR 34.1 (a)
April 20, 2010

Before: SCIRICA*, AMBRO, Circuit Judges, and JONES, **District Judge

(Opinion filed: May 10, 2010)

OPINION

AMBRO, Circuit Judge

This case is a challenge to the constitutionality of American military operations in Iraq. The plaintiffs seek a declaratory judgment that these operations have been waged in violation of the U.S Constitution. The District Court granted the Government's motion to dismiss for lack of subject matter jurisdiction, concluding that the plaintiffs lacked standing to bring such an action or, in the alternative, that the action itself was prohibited by the political question doctrine. For the reasons that follow, we affirm.

I.

Article I, § 8 of the United States Constitution grants to Congress the power to "declare War," while Article II provides that "[t]he

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* Judge Scirica completed his term as Chief Judge on May 4, 2010.

** The Honorable John E. Jones, III, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

executive Power shall be vested in a President" who "shall be Commander in Chief of the Army and Navy of the United States."

In October 2002, George W. Bush signed the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) (the "Authorization"). In relevant part, the Authorization provided the President with the following authority:

> (a) AUTHORIZATION.– The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to–
>
> (1) defend the national security of the United States against the continuing threat posed by Iraq; and
>
> (2) enforce all relevant United Nations Security Council Resolutions regarding Iraq.

Authorization, § 3. In March 2003, the President used his authority under the Authorization to invade Iraq. After the fall of Saddam Hussein's regime, the United States has maintained a military presence in that country at the request of its government. *See, e.g.*, S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec 18, 2007) (noting "the request conveyed . . . from the Prime Minister of Iraq to the President of the Council . . . to retain the presence of the multinational force in Iraq").

In May 2008 – over five years after the U.S. invasion of Iraq – the plaintiffs brought the current action, which alleges that "President Bush's authorization of an offensive military strike against the nation of Iraq violated Article 1, Section 8 of the United States Constitution, which assigns exclusively to Congress the duty to Declare War." App. 49-50. The plaintiffs are a diverse group – including a non-profit membership corporation (New Jersey Peace Action),[1] two mothers of children who have completed multiple tours of duty in Iraq (Paula Rogovin and Anna Berlinrut), and an Iraqi war veteran (William Joseph Wheeler). They assert a variety of injuries, which we consider in turn.

Turning first to New Jersey Peace Action, the organization alleges that the invasion of Iraq "impose[ed] a great 'opportunity cost' upon [it] because its leadership felt compelled to redirect its financial resources and staff to opposition to the war" rather than "other projects," such as "promoting nuclear disarmament, promoting a "Peace Economy,' opposing 'Star Wars,' and conducting peacemaking education programs in schools." App. 31. It also claims that "its members were injured by being deprived of the opportunity

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[1] An organization may have "representational" standing where: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). For reasons discussed in Part IV, *infra*, New Jersey Peace Action fails the first prong of the *Hunt* test.

to vote for or against their elected representatives based upon how their representatives voted on the issue of going to war in Iraq" and "being compelled to pay tax dollars for an unconstitutional war that they oppose." App. 31.

Rogovin and Berlinrout allege similar injuries to their rights as voters and taxpayers. In addition, they claim that "[t]he fact that no Declaration of War against Iraq was ever brought to a vote in Congress . . . directly caus[ed] [them] to suffer emotional, physical[,] and psychological injury," based on both their anger at President Bush and the emotional trauma of having their children deployed in a dangerous military conflict. App. 32, 33. Finally, they also allege an injury based on "opportunity costs" –namely, that the allegedly unconstitutional invasion of Iraq led them to devote time and resources opposing the war that they could have spent on other pursuits, including "gardening" and "working on new books." App. 32, 34.

Wheeler served in the U.S. Army from May 2001 through January 2004. During this period, he completed a tour of duty in Iraq, which lasted from March 2003 through November 2003. He was honorably discharged from the Army in January 2004, but subject to recall to active duty until May 2009. In the current action, Wheeler first alleges injuries based on the "emotional, psychological[,] and physical [e]ffects arising from the ordeal of combat." App. 35. Second, he claims that he "suffered injury by being compelled to obey orders that were unlawful because they were premised on the President's unconstitutional initiation of the

War in Iraq." App. 36. Finally, he alleges future injuries based on a possible recall order to serve in future unconstitutional wars "in Iran or elsewhere." App. 36.

In spite of the diverse injuries alleged, the plaintiffs seek a common form of relief a declaratory judgment that the "war in Iraq is being waged in violation of Article I, Sec. 8 of the United States Constitution." App. 28.[2] The plaintiffs allege that the Authorization's "principal vice . . . is that it denied the people knowledge of how representatives voted on the war, because their representatives never cast a vote clearly and solely on the issue of going to war." App 45. The plaintiffs also attack the "vagueness" of the Authorization, noting that it "gave the President room to assume unlimited discretion to attack Iraq." App. 45. In short, the plaintiffs argue that the Authorization "cannot be considered a Declaration of War because to do so would be to grant Congress the right to delegate its duty to determine whether or not war should be declared to the President." App.45–46. In the end, the plaintiffs contend that "[a] decision in favor of [them] in this case will clarify the constitutional issues concerning the current war, and will impact the manner in which future hostilities are considered by Congress and the President." App. 29.

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[2] In particular, the plaintiffs seek an order that "[d]eclare[s] that the President's order of March 2003 to invade the sovereign nation of Iraq, in the absence of a Congressional Declaration of War, violated Article I, Sec. 8 of the United States Constitution and the Due Process clause of the Fifth Amendment . . . ." App. 51-52.

The District Court concluded that the plaintiffs lacked standing to bring this suit and that, in the alternative, the suit was prohibited by the political question doctrine. For the reasons that follow, we affirm.

II.

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 2201. We have jurisdiction under 28 U.S.C. § 1291. The question of standing is subject to plenary review. *Goode v. City of Phila.*, 539 F.3d 311, 316 (3d Cir. 2008).

III.

"[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review . . . ." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (internal quotation marks omitted). Federal courts are limited by Article III of the U.S. Constitution to consider only actual "cases or controversies." *See Whitmore v. Arkansas*, 495 U.S. 149, 154–55 (1990). The "core" of the "case-or-controversy requirement" is the "triad of injury in fact, causation, and redressability." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).[3] This doctrinal core

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[3] "In addition to the immutable requirements of Article III, 'the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.'" *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (*quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474–75 (1982)). Two of these requirements are potentially implicated in this case. First, "the plaintiff generally must assert his own legal rights and

"serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore*, 495 U.S. at 155.which are appropriately resolved through the judicial process." *Whitmore*, 495 U.S. at 155.

To meet the "injury-in-fact" requirement, a plaintiff must establish "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). To meet the "causation" requirement, a plaintiff must establish "a causal connection between the injury and the conduct complained of." *Id.* Finally, to meet the redressability requirement, a plaintiff must establish that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted). If a litigant does not meet these requirements, the case must be dismissed for lack of subject matter jurisdiction. *See Steel Co.*, 523 U.S. at 88–89. This is true even when a plaintiff seeks a declaratory judgment. *See, e.g., St. Thomas–St. John Hotel & Tourism Ass'n, Inc. v. Gov't of the U.S. Virgin Islands*, 218 F.3d 232, 240 (3d Cir. 2000) ("A declaratory judgment . . . can issue only when the constitutional standing

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interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Second, a court may dismiss a suit for lack of standing "when the asserted harm is a 'generalized grievance' shared in a substantially equal measure by all or a large class of citizens." *Id.*

requirements of a 'case' or 'controversy' are met.").[4] Importantly, "[t]he party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

IV.

To repeat, the plaintiffs collectively seek a declaratory judgment that President Bush's order to invade Iraq was unconstitutional. They argue that

> they have standing to seek a Declaratory Judgment because they are among "the People of the United States, [who] in Order to form a more perfect Union" established a constitution that imposed explicit procedural requirements that must be followed[,] . . . and they have suffered injuries because of President Bush's violation of those requirements.

Appellants' Br. 45 (*quoting* U.S. Const. pmbl.). Even were we to assume that the plaintiffs are ."injury-in-fact" and "causation" requirements, we conclude that their proposed declaration would not

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[4] In the context of a declaratory judgment, the "case or controversy" requirement may be satisfied when "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir. 1990) (internal quotation marks omitted).

redress their alleged injuries.[5] Therefore, we hold that they lack standing to bring the current action.

On appeal, the plaintiffs stress that they are not "seeking relief in the form of damages," but instead "are merely seeking a declaratory judgment, which . . . will be sufficient to provide them with at least some remedy for the harm they have suffered." Reply Br. 18. In particular, the plaintiffs argue that "[t]he Declaratory Judgment sought herein would likely prevent a recurrence of the challenged presidential conduct," as well as remedy their individual injuries by "vindicating the Fundamental Constitutional Right that they claim." Appellants' Br. 49. They allege that such relief would "provide great redress [to them]," *id.* at 51, by "effectively acting as a formal apology," Reply Br. 23.

Nevertheless, the plaintiffs' proposed relief would not give them a fresh opportunity to cast (more) informed votes for their representatives, pay them back for tax dollars expended, or allow them to reallocate time already spent opposing military operations in Iraq. It would not take back the allegedly unlawful orders that Wheeler has already obeyed, nor would it provide any concrete compensation for the emotional, psychological, and physical injuries that he has allegedly suffered.[6] Indeed, it is "merely speculative" that any psychic

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[5] Since we conclude that none of the plaintiffs has standing, we need not address the District Court's application of the political question doctrine to this action.

[6] Wheeler himself is no longer subject to recall into military service. *See* App. 34.

benefits of declaratory relief would redress the "emotional, physical[,] and psychological injur[ies]" already suffered by the plaintiffs in this case. Finally, even if we were to grant the proposed declaratory relief, it is unclear that it would have any practical effect on the actions of the President and Congress in the face of any future (as yet unspecified) military conflict.

In the end, the plaintiffs filed this action more than five years after the American invasion of Iraq. As the Government notes, our current commitments in that country are "at the request of [its] Government . . . —a fact that plaintiffs do not dispute." Appellee's Br. 5. Therefore, even assuming the truth of the plaintiffs' allegations, the "illegal" war itself has effectively ended. President George W. Bush is no longer President, and his party was defeated at the polls in 2008. Furthermore, the plaintiffs stress that their "Complaint seeks no coercive relief against the President and does not ask the court to intervene in any way with the hostilities in Iraq." Appellants' Br. 3.[7] It does not "seek to improve the manner in which President George W. Bush exercised his power and President Obama is exercising his power." Reply Br. 14. The plaintiffs further concede that "the War in Iraq obviously cannot be undone by judicial decree or by any other mortal act." *Id.* at 22. Given this, they concede that "the redress that

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[7] This key fact distinguishes this case from *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971). In *Laird*, the plaintiffs brought an action to enjoin ongoing military operations in Southeast Asia. *Id.* at 28.

Plaintiffs are capable of obtaining here is limited and imperfect." Appellants' Br. 50.

With these limitations in mind, the plaintiffs speculate that the proposed declaratory relief would, if granted, serve to guide future executive and legislative decision-making. In particular, the plaintiffs claim that a declaratory judgment from this Court would "necessarily cause the current and future Presidents to refrain from utilizing legislative devices—such as the [Authorization]—to avoid the Constitution's requirement of a Congressional Declaration of War before invading a sovereign state that has not attacked the United States." Reply Br. 22–23. We conclude that such speculation is of insufficient "immediacy and reality" to justify a declaratory judgment in this case.[8] *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir. 1990) (internal quotation marks omitted); *see also St. Thomas*, 218 F.3d at

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[8] Such an action also runs afoul of the well-recognized prudential limit on our standing to hear actions that constitute "generalized grievances." As the Supreme Court noted in *Lujan*, the Court has

> consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

504 U.S. at 573–74.

240 ("Although declaratory judgments are frequently sought in advance of the full harm expected, they must still present a justiciable controversy rather than 'abstract, hypothetical[,] or contingent questions.'") (*quoting Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945)). Hypothetical wars against possible foes are neither "immediate" nor "real." Furthermore, it is an exercise in judicial guesswork to predict what form such a hypothetical conflict would take, including how the President would choose to proceed and what type of authorization Congress might grant (if any). Given this, it is unclear whether any such conflict would resemble our recent activities in Iraq—and even less clear how a declaratory judgment from our Court in the current case would inform any future actions by the President and Congress.

* * * * *

For these reasons, we agree with the District Court that in this case "[a] judicial declaration of unconstitutionality would be, at best, an advisory opinion not sufficient to redress any of Plaintiffs' claimed injuries." App 13. Therefore, we affirm the Court's judgment.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW JERSEY PEACE ACTION, et al.,	:
Plaintiffs,	:
v.	:
BARACK H. OBAMA[1], President of the United States in his official capacity,	:
Defendant.	:

CIVIL ACTION NO. 08-2315 (JLL)

AMENDED OPINION[2]

LINARES, District Judge.

Pending before this Court is Defendant's motion to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ.

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[1] The Court has automatically substituted the original Defendant in this matter – George W. Bush – with the new President, Barack H. Obama. Fed. R. Civ. P. 25(d)(1).

[2] This Opinion amends the Opinion of May 19, 2009 (Docket # 21) only to the extent that it corrects the formatting of the block quote on page 14.

P. 12(b)(1). Having heard oral argument and having considered the briefs filed on behalf of the parties, the Court grants Defendant's motion to dismiss.

I. Background

On May 13, 2008, Plaintiffs filed a Complaint instituting the present action. Subsequently, on September 8, 2008, Plaintiffs filed an Amended Complaint against the President of the United States, in his official capacity, seeking a declaratory judgment that the "war in Iraq is being waged in violation of Article I, Sec. 8 of the United States Constitution." (Am. Compl. ¶ 1.) Plaintiffs allege the following.

On October 16, 2002, President Bush signed into law the Authorization for Use of Military Force Against Iraq Resolution of 2002, H.J. Res. 114, 107th Congress (2d Sess. 2002) (the "AUMF"). The AUMF provided as follows:

> The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to –
>
> 1) defend the national security of the United States against the continuing threat posed by Iraq; and
> 2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

AUMF, §3 (a). Acting pursuant to authority granted by the AUMF, President Bush commenced an invasion of Iraq on March 20, 2003. (Am. Compl.

¶ 18, 19.) The United States continues to conduct military operations in Iraq, even though the Saddam Hussein regime has been overthrown and a constitutional government has been elected. (Id. ¶ 19.) "There has never been a Declaration of War by Congress against Iraq." (Id. ¶ 24.) Because President Bush ordered a strike against Iraq without an explicit declaration of war, his authorization violated Article I, Section 8 of the United States Constitution. (Id. ¶ 54.)

Plaintiffs to this action include New Jersey Peace Action, a non-profit membership corporation, and individuals Paula Rogovin, Anna Berlinrut, and Joseph Wheeler. They all assert various injuries associated with the decision to invade Iraq and seek a Declaratory Judgment, pursuant to 28 U.S.C. § 2201, that the "war" in Iraq was unconstitutional. Presently before the Court is Defendant's motion to dismiss, in which three distinct arguments are raised – 1) the Plaintiffs lack standing; 2) Plaintiffs' claims are barred by the political question doctrine; and 3) Plaintiffs' claims lack merit.

II. Standing

Under Fed. R. Civ. P. 12(b)(1), a court must grant a motion to dismiss if it lacks subject-matter jurisdiction to hear a claim. Standing is a jurisdictional matter and thus "a motion to dismiss for want of standing is also properly brought pursuant to Rule 12(b)(1)." Ballentine v. United States, 486 F.3d 806, 810 (3d Cir. 2007). A 12(b)(1) motion to dismiss may be treated as either a "facial or factual challenge to the court's subject matter

jurisdiction." Gould Electronics Inc. v. U.S., 220 F.3d 169, 176 (3d Cir. 2000). Under a facial attack, the movant challenges the legal sufficiency of the claim and the Court considers only "the allegations of the complaint and documents referenced therein and attached thereto in the light most favorable to the plaintiff." Id. In reviewing a factual attack, however, the challenge is to the actual alleged jurisdictional facts. Thus, a court is free in that instance to consider evidence outside the pleadings. Id. Finally, once a 12(b)(1) challenge is raised, the burden shifts and the plaintiff must demonstrate the existence of subject-matter jurisdiction. PBGC v. White, 998 F.2d 1192, 1196 (3d Cir. 2000). Here, Defendant offers extrinsic evidence challenging certain of Plaintiffs' jurisdiction assertions. Thus, to the extent that certain of Plaintiffs' jurisdictional allegations are challenged on the facts, those claims receive no presumption of truthfulness.

Article III of the Constitution limits federal courts to the adjudication of actual "cases" or "controversies." Several justiciability doctrines – including standing, mootness, ripeness, and political question – "state fundamental limits on federal judicial power in our system of government." Allen v. Wright, 468 U.S. 737, 750, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984). "The Article III doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines." Id.; see also Sprint Commc'ns Co. v. APCC Servs., Inc., __ U.S. ___, 128 S. Ct. 2531, 2535, 171 L. Ed. 2d 424 (2008) (the "case-or-controversy requirement is satisfied only where a plaintiff has standing."). The

fact that this is an action for Declaratory Judgment does not eliminate the requirement of standing – rather, "[a] declaratory judgment may issue only where the constitutional standing requirements of a justiciable controversy are satisfied." National Ass'n For Stock Car Auto Racing, Inc. v. Scharle, 184 Fed. Appx. 270, 274 (3d Cir. 2006); see also St. Thomas -St. John Hotel & Tourism Ass'n, Inc. v. Gov't of the U.S. Virgin Islands, 218 F.3d 232, 240 (3d Cir. 2000) ("A declaratory judgment or injunction can issue only when the constitutional standing requirements of a "case" or "controversy" are met.").

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Sedlin, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975). Standing consists of three components. First, "the plaintiff must have suffered an injury-in-fact – an invasion of a legally protected interested which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (internal citations and quotation marks omitted). Second, there must be a causal connection between the injury and the offending conduct. Id. Thus, the injury must be "fairly traceable" to the challenged action of the defendant. Id. Finally, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. at 561, 2136. In the Declaratory Judgment context, the Third Circuit has acknowledged that

declaratory judgments are "frequently sought before injury has actually happened" and that in those cases standing requirements are satisfied when "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Step-Saver Data Systems, Inc. v. Wyse Technology, 912 F.2d 643, 647 (3d Cir. 1990) (quoting Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L. Ed 826 (1941)).

Plaintiffs bring the instant action asking only for a declaration that the 2003 order to invade Iraq was unconstitutional. Thus, because the action is brought after the-fact, the Court evaluates Plaintiffs' allegations under both the three-part Lujan inquiry as well as the less stringent Declaratory Judgment analysis. Finally, Plaintiffs bear the burden of establishing standing. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342, 126 S. Ct. 1854, 1861, 164 L. Ed. 2d 589 (2006).

A. Injury-in-Fact

In this case, Plaintiffs allege various injuries. First, Plaintiffs Paula Rogovin ("Rogovin") and Anna Berlinrout ("Berlinrout") allege nearly identical injuries. Specifically, they allege that as registered voters, they were "deprived of the opportunity to vote for or against [their] elected representatives based upon how they voted on the issue of going to war in Iraq..." (Am. Compl. ¶ 9, 12.) Additionally, both Rogovin and Berlinrout allege that "the fact that no Declaration of War against Iraq was ever brought to a vote in

Congress...directly caus[ed] [them] to suffer emotional, physical and psychological injury" and that they maintain "great anger at the President's blatant violations of the Constitution." (Id. ¶ 10, 12.) Finally, they both allege the payment of an "opportunity cost" in terms of the time and resources expended to oppose the war, including "being compelled to pay tax dollars for an unconstitutional war." (Id.)

Plaintiff William Joseph Wheeler served in the United States Army from May 23, 2001 to January 5, 2004, and served in Iraq from March 2003 to November 2003. (Id. ¶ 13.) On January 5, 2004, he received an Honorable Discharge "as a result of a 'physical condition not a disability.'" (Id.) He is subject to recall to active duty until May 2009. (Id.) Wheeler alleges injuries comprising the "emotional, psychological and physical affects arising from the ordeal of combat..." (Id. ¶ 14.) Finally, he claims to have "suffered injury by being compelled to obey orders that were unlawful because they were premised on the President's unconstitutional initiation of the War in Iraq without a Congressional Declaration of War." (Id.) He also claims the potential of future injury should the United States initiate another war "in Iran or elsewhere in the absence of a Congressional Declaration of War." (Id.) The Court addresses each claimed injury to evaluate whether it meets the "concrete and particularized" and "actual or imminent" requirements of Lujan.

First, the fact that Plaintiffs Rogovin and Berlinrout suffered some "opportunity cost" in terms of a re-direction of resources does not

constitute an injury sufficient to garner Article III standing. It is neither concrete nor particularized. Nor is Plaintiffs' disagreement or strong anger at the President's decision to go to war an injury sufficient to establish standing. "Disagreement with government action or policy, however strongly felt, does not, standing alone, constitute an 'injury' in the Constitutional sense which is cognizable in the federal courts susceptible of remedy by the judicial branch." Evans v. Lynn, 537 F.2d 571, 598 (2d Cir. 1975). The fact that a single Plaintiff disagrees with a governmental policy is not concrete or particularized and therefore does not raise adequately raise an "injury-in-fact."

Next, Plaintiffs Rogovin and Berlinrout claim injury arising from the deprivation of the opportunity to vote for or against their elected representatives on the issue of declaring war on Iraq. This, too, fails to satisfy the well-established "concrete and particular" standard. Under Plaintiff's logic, all citizens would be entitled to bring this action because every voter was effectively deprived of the right to have his or her representative cast a vote for or against declaring war on Iraq. While Plaintiffs, and many like-minded voters, may have wanted to hear their representatives' views on a war with Iraq, the alleged absence of debate does not give rise to an Article-III injury. Rather than particularized, this injury is the very epitome of general. "[S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens

share." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220, 94 S. Ct. 2925, 2932, 41 L. Ed. 2d 706 (1974).

As to Rogovin's and Berlinrout's desire to avoid paying taxes "for an unconstitutional war," that injury has been roundly dismissed by the Supreme Court. A citizen does not gain standing to challenge a government action simply by being a taxpayer. "[S]uits premised on federal taxpayer status are not cognizable in the federal courts because a taxpayer's 'interest in the moneys of the Treasury is shared with millions of others, is comparatively minute and indeterminable.'" ASARCO Inc. v. Kadish, 490 U.S. 605, 613-14, 109 S. Ct. 2037, 2043, 104 L. Ed. 2d 696 (1989) (quoting Frothingham v. Mellon, 262 U.S. 447, 487, 43. S. Ct. 597, 601, 67 L. Ed. 1078 (1923)). The only exception to the general bar on taxpayer standing was enunciated in Flast v. Cohen, where the Supreme Court outlined a narrow exception finding standing for challenges to government expenditures that violate the Establishment Clause. 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). Plaintiffs do not argue that the Flast exception applies here. Thus, because Plaintiffs premise their suit on a generalized grievance stemming from the allegedly wrongful payment of taxes, their injury does not warrant Article III standing.

Finally, Plaintiff Wheeler's injuries are – at least in part – not proper injuries in fact. To the extent he asserts any future injury stemming from the possibility of recall to active duty in the event of a war with Iran (Am. Compl. ¶ 15), that injury is not actual or imminent. No war on Iran has yet

been declared. Any associated injury is, therefore, purely speculative and does not present an actual "case or controversy" for this Court to adjudicate. As to Wheeler's other injuries – namely the emotional and physical injuries he suffered in Iraq – Defendant argues that he lacks standing to challenge the orders of his Commander-in-Chief in a judicial forum. Plaintiffs have not responded to this argument, and thus it is effectively conceded. However, the Court does not rely upon his inability to question the orders of his military superiors as a basis upon which to deny standing. In this instance, to the extent he alleges specific physical and emotional injuries, the Court proceeds to analyze those claims under the redressability prong of the Lujan analysis.

B. Causation

The parties only tangentially touch on causation, and the Court includes it simply to note that at least as to Plaintiffs' injuries stemming from the failure to cast an informed vote, the standing inquiry falls on causation as well. Even if Congress had engaged in a full-fledged debate about the propriety of declaring war on Iraq, Plaintiffs would not necessarily have had the opportunity to hear their representatives' views on the subject. Certainly, no representative is obligated to participate in debate or present all of his views on any given topic. Thus, Plaintiffs cannot claim that their inability to hear their representatives' views is "fairly traceable" to the lack of a declaration of war. This is especially true where, as here, Defendant has put forth several

statements made by Plaintiffs' representatives during the debate on the AUMF clearly articulating their positions either for or against authorizing military force.

C. Redressability

Assuming *arguendo* that Plaintiffs had alleged injuries adequate to satisfy the first two prongs of the Lujan analysis, the standing analysis would still fail at the redressability stage. In the redressability inquiry, it must be likely, not simply speculative, that the injury would be redressed by a favorable decision. Even if the Court were to grant Plaintiffs the full relief they seek – a declaration that the order to invade Iraq was unconstitutional – none of Plaintiffs' injuries would be redressed. Rogovin and Berlinrout would still lack the ability to cast a vote based upon their representatives' views on going to war with Iraq. Nor would they recover any tax monies paid or other resources already expended in opposing the war. As to Wheeler, a declaration of unconstitutionality in the form he seeks does not redress the fact that he obeyed allegedly unlawful orders. Nor does it prevent or compensate for any emotional or physical injuries Wheeler may have suffered. At the end of the day, the simple fact is that Plaintiffs filed this action more than five years after the commencement of hostilities in Iraq. Plaintiffs have not rebutted or contested Defendant's claim that current and future deployments to Iraq are "deployments of troops to a friendly nation, at the request of that nation." (Def. Br. 14.) Thus, because the allegedly illegal war has already concluded,

Plaintiffs' lack of timeliness in bringing the present action is dispositive as to the issue of standing. A judicial declaration of unconstitutionality would be, at best, an advisory opinion not sufficient to redress any of Plaintiffs' claimed injuries.

Nor does Plaintiffs' argument that they could seek damages, but have chosen to forego them, save their Complaint. As an initial matter, under City of Los Angeles v. Lyons, 461 U.S. 95, 105, 103 S. Ct. 1660, 1667, 75 L. Ed. 2d 675 (1983), plaintiffs must establish standing for the relief they presently seek, which is declaratory relief against future unconstitutional conduct. The fact that past unconstitutional conduct might give rise to a claim for damages does not give rise to an action for declaratory relief against future conduct. Id. Additionally, however, monetary damages would not redress Plaintiffs' injuries arising from the inability to cast an informed vote or the opportunity cost of time lost to opposing the war. Finally, and most importantly, Plaintiffs have no claim for monetary damages. In the absence of a waiver, any damages suit against the United States for an alleged constitutional violation is barred by sovereign immunity. United States v. Mitchell, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351, 63 L. Ed. 2d 607 (1980). Moreover, the doctrine of sovereign immunity extends to individual officers sued in their official capacity, as in this case, because official-capacity suits are treated as suits against the entity. Kentucky v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985). Thus, Plaintiffs' argument that pleading damages would save their claims is legally incorrect.

Pleading damages would not only run afoul of sovereign immunity, it would also fail to establish standing as to the present declaratory judgment action.

Next, to the extent that Plaintiffs cite to Massachusetts v. Laird and Doe v. Bush for the proposition that both cases adjudicated the merits of a "failure to declare war" action rather than dismissing the suit on standing grounds, that contention is unpersuasive. First, Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971) is factually distinct. It concerned an action brought to enjoin the ongoing war in Southeast Asia. Id. at 28. Thus, that case presented the possibility of redressing Plaintiffs' injuries by actually ending or enjoining the war. Id. Here, no such possibility exists. Plaintiffs acknowledge that they cannot "undo the invasion of Iraq" and that they are not asking to "order the military home." (Opp'n Br. 56.) Unlike Massachusetts v. Laird, their action comes after the war rather than before or during it, a difference that is fatal to the redressability prong of the standing analysis. Next, in Doe v. Bush, the First Circuit did not find that Plaintiffs had standing to bring the action; rather, the Court decided not to "to reach all the issues concerning the justiciability of the case, including the question of the parties' standing." 323 F.3d 133, 135 n.2 (1st Cir. 2003). The Court declined to hear the suit on the ground that it was not yet ripe for judicial review and simply noted that there is no required sequence to the consideration of non-merits issues. Id. Thus, having found the suit non-justiciable because of ripeness, it did not also need to reach the issue of

standing. Neither case, therefore, is on point with regard to the issue of standing in the present matter.

Finally, the Court notes that even under the standing inquiry as applied to Declaratory Judgments, Plaintiffs' claims fail. At the very least, Plaintiffs have not alleged a dispute of "sufficient immediacy and reality" to warrant the issuance of a Declaratory Judgment. Aside from the fact that a declaration of illegality would not redress their claimed injuries, Plaintiffs' allegations as to the need for such a declaratory judgment are based in large part on the potential for future "wars" with the countries of Pakistan or Iran. (Am. Compl. ¶ 23.) These theoretical wars are neither immediate nor real, and Plaintiffs accordingly lack standing to bring this action.[3]

At the end of the day, Plaintiffs allege too little and institute their suit too late. Thus, as per Lujan, their claims are not justiciable because they fail to surmount their burden of proving standing.[4]

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[3] Plaintiff NJPA is a membership organization. In order to establish standing, it must prove that: (1) its members would have otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members. Friends of the Earth, Inc. v. Laidlaw Environmental Servs., 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). As outlined above, Rogovin, Berlinrout, and Wheeler lack standing to sue in their own right. Thus, Plaintiff NJPA fails the first prong of this test.

[4] It is unclear whether Plaintiffs also rely upon the doctrine of "capable of repetition yet evading review." Plaintiffs raise this doctrine in their Amended Complaint (¶

III. Political Question Doctrine

Alongside standing, Defendant also moves to dismiss the allegations in the Amended Complaint as non-justiciable pursuant to the political question doctrine and Fed. R. Civ. P. 12(b)(1). Courts, however, are somewhat divided as to whether the political question doctrine constitutes a jurisdictional or prudential limitation. Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007) ("...it is not a contradiction to speak of the political question doctrine as both prudential and jurisdictional."). While jurisdictional issues implicate Rule 12(b)(1), prudential concerns would warrant evaluation under Rule 12(b)(6). This Court, however, agrees that the doctrine is "at bottom a jurisdictional limitation imposed on the courts by the Constitution, and by the judiciary itself." Id. Thus, it is properly evaluated under Rule 12(b)(1), and the Court is free to look beyond the face of the complaint to properly ascertain whether or not the political question doctrine renders it non-justiciable.

In Marbury v. Madison, Chief Justice Marshall first articulated the political question doctrine, by holding that the Constitution invested in the President "certain important political powers, in the exercise of which he is to use his own

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4) but fail to acknowledge or reference it in their opposition brief. In any event, the doctrine is inapplicable. If a plaintiff lacks standing, the doctrine of capable of repetition yet evading review does not save the claims. Friends of the Earth, 528 U.S. at 191. Thus, because Plaintiffs fail to establish standing, they cannot rely upon this doctrine to proceed to the merits.

discretion, and is accountable only to his country in his political character, and to his own conscience." Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 165-66, 2 L. Ed. 60 (1803). Thus, "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." Id. at 170. Since Chief Justice Marshall's initial formulation of the political question doctrine, it has been broadened to preclude justiciability of allegations concerning, inter alia, challenges to the impeachment process, questions implicating the Guarantee Clause,[5] and most importantly for the present purposes, areas of foreign policy. Nixon v. United States, 506 U.S. 224, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993) (holding that Senate retained the sole discretion to choose impeachment procedures and therefore the controversy was non-justiciable); Luther v. Borden, 7 How. 1, 48 U.S. 1, 12 L. Ed. 581 (1849) (finding that the Guarantee Clause of the Constitution commits to Congress the issue of whether a particular government is the established one in a State); Oetjen v. Central Leather Co., 246 U.S. 297, 302, 38 S. Ct. 309, 311, 62 L. Ed. 726 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.").

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[5] The Guarantee Clause states as follows: "The United States shall guarantee to every State in this Union a Republican form of Government." U.S. Const. art. 4, § 4, cl.1.

In 1962, the Supreme Court set forth a broad formulation of political question analysis. Baker v. Carr, 369 U.S. 186, 210, 82 S. Ct. 691, 706, 7 L. Ed. 2d 663 (1962). Justice Brennan, writing for a plurality, first held that the political question doctrine implicates the separation of powers – that it arises from the "relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States..." Id. He then set forth a six-factor determination to analyze whether an issue constitutes a non-justiciable political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217, 710. Where one of these factors is inextricable from a case, a federal court should dismiss the case on political question grounds. Id. However, the doctrine must be cautiously invoked, and the mere fact that a case touches on the political process does not automatically render it beyond the court's jurisdiction. Nixon v. Herndon, 273 U.S. 536, 540, 47 S. Ct. 446, 446, 71 L. Ed. 759 (1927).

Under Baker, this Court finds that the present allegations clearly concern at least two of the Carr factors – the textual commitment of the issue to a coordinate political department and the lack of judicially discoverable standards for resolving it. First, "the Constitution commits the entire foreign policy power of this country to the executive and legislative branches." Atlee v. Laird, 347 F. Supp. 689, 694 (E.D. Pa. 1972); see also Doe v. Bush, 323 F.3d 133, 140 (1st Cir. 2003) ("The Constitution explicitly divides the various war powers between the political branches"); Ange v. Bush, 752 F. Supp. 509, 514 (D.D.C. 1990) ("there is an explicit textual commitment of the war powers not to *one* of the political branches, but to *both*") (emphasis in original). Thus, while Congress retains the power to declare war, U.S. Const., art. 1, § 8, cl. 11; to raise and support armies, cl. 12, and to "provide and maintain a navy," cl. 13, the President is commander-in-chief of the armed forces. U.S. Const. art. II, § 2, cl. 1. The two branches share the broad array of war powers, and the Constitution allows them to work out disputes themselves.

Given this textual commitment of "war powers" to the political branches, courts are rightfully reluctant to act in the absence of an actual dispute between Congress and the President. As Justice Jackson noted in Youngstown Sheet & Tube, there exists a "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain.... In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637, 72 S. Ct. 863, 871, 96 L. Ed. 1153 (1952) (Jackson, J., concurring). In this case, Congress deliberated and eventually passed the AUMF. Acting pursuant to the AUMF, President Bush invaded Iraq. No dispute has arisen between Congress and the President, and Plaintiffs make no such allegation. Rather, pursuant to the Constitution's joint power-sharing arrangement as to "war powers," the political branches have resolved this foreign policy dispute. In the absence of any alleged dispute between them, this court must stand down.

Plaintiffs attempt to avoid the "textual commitment" factor by arguing the merits – specifically, they claim that judicial abdication is unwarranted precisely because the "Declare War power is expressly committed by the text of the Constitution to Congress, not the Executive." (Opp'n Br. 44.) This argument is unavailing. The power to declare war certainly resides with Congress. U.S. Const. art. I, § 8, cl. 11. However, as the First Circuit noted, the power to declare war

does not imply the more general negative that "Congress has no power to support a state of belligerency beyond repelling attack and short of a declared war." Mass. v. Laird, 451 F.2d 26, 32 (1st Cir. 1971). Rather, while the power to declare war was textually committed to Congress, "the power to conduct undeclared hostilities beyond emergency defense...[was] committed to both branches, whose joint concord precludes the judiciary from measuring a specific action against any specific clause in isolation." Id. The world of hostilities, therefore, does not neatly break down into the categories of "war" and "not war." Rather, the political branches are empowered to conduct and maintain hostilities short of war and Congress may determine whether and when a declaration of war is necessary. As Chief Judge Wyzanski, in the District of Massachusetts, held, "the distinction between a declaration of war and a cooperative action by the legislative and executive with respect to military activities in foreign countries is the very essence of what is meant by a political question." United States v. Sisson, 294 F. Supp. 511, 515 (D. Mass. 1968). It is not enough to assert that the power to declare war resides with Congress and that therefore the judiciary is empowered to adjudicate any situation in which hostilities have commenced to determine whether or not those hostilities are tantamount to "war." If this Court accepted Plaintiffs' invitation to make that decision, it would have to be prepared to fully measure every future instance of hostilities against the Constitution's "declare war" clause. This the Court is not prepared to do.

Importantly, the very act of second-guessing Congress's decision not to declare war is outside of the judiciary's sphere of competence. A declaration of war triggers "treaty obligations and domestic emergency powers." Massachusetts v. Laird, 451 F.2d 26 at 32. "A determination not to declare war is more than an avoidance of a domestic constitutional procedure. It has international implications of vast dimensions." Sisson, 294 F. Supp. at 515. Rather than leaving to Congress the issue of whether to declare war and thereby invoke various corresponding obligations, Plaintiffs would have this Court second-guess Congress's decision to authorize something short of "war." This is plainly not the judiciary's role. As a three-judge panel in Atlee noted:

> Because the Constitution has given to Congress, and not the courts, the initial policy determinations whether to declare war formally and, if not, what steps to take short of formal declaration, we are bound not to enter the realm of foreign policy committed to another branch of government by adjudicating this question on the merits.

Atlee v. Laird, 347 F. Supp. at 706. Congress is fully-equipped to analyze the treaties, policy considerations, and accompanying obligations that would follow from a declaration of war and to choose a separate path accordingly. The fact that the United States is engaged in military action absent a declaration of war does not automatically

invite the judiciary's analysis as to whether that action is "constitutionally sanctioned."

Finally, even if this matter were not textually committed to the political branches, the Court is presented with no set of judicially manageable standards that would allow it to determine whether indeed the United States was, or is, at war. To resolve Plaintiffs' dispute, the Court would have to propound a rational list of factors analyzing whether the country is actually at war, or whether it is engaging in some form of hostilities short of war. See, e.g., Atlee, 347 F. Supp. at 705 ("[p]erhaps in 1787 it was possible to weight a given set of factors and decide whether particular hostilities constituted war. However, the variety of hostilities possible in 1972, makes the formulation of rational standards a task not met for the judiciary."). Not only is Congress better equipped to make that determination, but under Baker, it is a determination that is inherently fraught with a lack of judicially applicable standards.

The simple fact of the matter is that Plaintiffs ask this Court to adjudicate an issue that is textually committed to Congress and the President. In the absence of an actual dispute between the political branches, this Court cannot intervene. The issues raised are barred by the political question doctrine, and thus the suit must be dismissed.

IV. Conclusion

Having evaluated the arguments in favor of and against dismissal of the present suit, the Court

find that Plaintiffs' claims are not justiciable. They have failed to clear the standing requirements of Article III and equally important, the issues raised by the Amended Complaint fall squarely within the political question doctrine. Accordingly, Defendant's motion to dismiss is granted.

An appropriate Order accompanies this Opinion.

Dated: June 2, 2009 /s/ Jose L. Linares
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2781

NEW JERSEY PEACE ACTION; PAULA ROGOVIN; ANNA BERLINRUT; WILLIAM JOSEPH WHEELER,

Appellants

v.

BARACK H. OBAMA, President of the United States, in his Official Capacity

(Pursuant to F.R.A.P. 43(c))

(D.C. Civil Action No. 2-08-cv-02315)

Before: Before: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, and VANASKIE, Circuit Judges, and JONES,[1] District Judge

PETITION FOR REHEARING *EN BANC*

[1] The Honorable John E. Jones, III, United States District Judge for the Middle District of Pennsylvania, sitting by designation and limited to panel rehearing only.

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED

By the Court,
s/ Thomas L. Ambro, Circuit Judge

Dated: July 7, 2010

CJG/cc: Frank Askin, Esq.
Bennet D. Zurofsky, Esq.
Michael P. Abate, Esq.
Mark B. Stern, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2781

NEW JERSEY PEACE ACTION; PAULA ROGOVIN; ANNA BERLINRUT; WILLIAM JOSEPH WHEELER,

Appellants

v.

BARACK H. OBAMA, President of the United States, in his Official Capacity

(Pursuant to F.R.A.P. 43(c))

Appeal from the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 2-08-cv-02315)
District Judge: Honorable Jose L. Linares

Submitted Under Third Circuit LAR 34.1(a)
April 20, 2010

Before: SCIRICA*, AMBRO, Circuit Judges, and JONES, ** District Judge

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on April 20, 2010.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court entered May 19, 2009, be and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron
Clerk

Dated: May 10, 2010

Certified as a true copy and issued in lieu of a formal mandate on July 15, 2010
Teste: Marcia M. Waldron
Clerk, U.S. Court of Appeals for the Third Circuit

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* Judge Scirica completed his term as Chief Judge on May 4, 2010.

** The Honorable John E. Jones, III, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW JERSEY PEACE ACTION,	:
PAULA ROGOVIN, ANNA BERLINRUT	:
and WILLIAM JOSEPH WHEELER	:
Plaintiffs,	:
v.	:
GEORGE W. BUSH, PRESIDENT	:
OF THE UNITED STATES, IN HIS	:
OFFICIAL CAPACITY,	:
Defendant.	:

Civil Action

Hon. Jose L. Linares

2:08-cv-02315-JLL-CCC

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

PRELIMINARY STATEMENT

1. Plaintiffs seek a Declaratory Judgment that the current war in Iraq is being waged in violation of Article I, Sec. 8 of the United States Constitution ("Congress shall have the power to declare war") because Congress has enacted neither a Declaration of War nor an explicit, intentional and discrete authorization of war prior to hostilities; because Congress may not transfer its constitutionally mandated duties to the Executive; and because the Authorization for the Use of Military Force (AUMF) of October, 2002 deprived American citizens of the opportunity to vote for or against their elected representatives based upon how their representatives voted on the issue of going to war in Iraq, a right protected by Article I, Section 5(3) of the Constitution as implemented by the Due Process Clause of the Fifth Amendment.

2. Plaintiffs are aware that since the end of World War II, efforts to secure a judicial determination of the President's power to wage war without such a Declaration have failed in the lower

federal courts either on procedural grounds, or because Congressional financial support for military action was viewed as supporting Presidential action, or because of an unwarranted application of the political question doctrine. But only two of those prior decisions of the lower federal courts upheld on the merits the constitutional power of the President to launch an offensive war against a sovereign nation without an Article I, Section 8 Declaration – and those opinions ignored a major piece of constitutional history. Nor were any of those prior decisions affirmed by the Supreme Court of the United States. The Constitution may not be amended by persistent evasion.

3. To avoid constant repetition of the lawless exercise of the awesome war-making power and restore the proper functioning of our constitutional system, it is necessary that the judicial branch definitively state what the Founders intended when they enacted Article 1, Sec. 8. (Marbury v. Madison.)

4. In particular, because the Bush Administration is presently threatening to wage war – this time against Iran – without a Congressional Declaration of War, it is essential that the judicial branch act expeditiously. A decision in favor of Plaintiffs in this case will clarify the constitutional issues concerning the current war, and will impact the manner in which future hostilities are considered by Congress and the President. Our half century of experience with undeclared wars, the continued threats from the White House of a new presidential war, Congress'

avoidance of its responsibility to vote on the issue of going to war, along with the heightened and continuing risks of terrorist attacks requiring a military response, makes this a classic example of an issue which is capable (and likely) of repetition yet may otherwise evade review if not now considered by the courts.

JURISDICTION AND VENUE

5. Jurisdiction is proper in this Court under 28 U.S.C. Secs. 1331 and 2201-2202 in that Plaintiffs' claims arise under the United States Constitution, Article I, Sec. 8 and the Fifth Amendment.

6. Venue is proper in this Court under 28 U.S.C. Sec. 1391 in that Plaintiffs include residents of New Jersey.

INJURY TO PARTIES

7. NEW JERSEY PEACE ACTION (NJPA) is a New Jersey nonprofit membership corporation. NJPA has worked for more than 50 years to promote nuclear disarmament and peaceful alternatives to war. NJPA has sponsored many public discussions and events over the past 6 years in an effort to educate and inform members of the New Jersey Congressional delegation and the public about issues, causes and alternatives to the War in Iraq, the invasion of Iraq and the ongoing occupation of Iraq. Before the start of the war, NJPA communicated with numerous elected officials urging them to vote against any declaration of war against Iraq.

8. The fact that no declaration of war against Iraq was ever brought to a vote in Congress, in violation of due process rights, has directly caused injury to NJPA and to its members by, among other things, imposing a great "opportunity cost" upon the organization because its leadership felt compelled to redirect its financial resources and staff to opposition to the war and was thereby deprived of the ability to devote its resources to such other projects as promoting nuclear disarmament, promoting a "Peace Economy," opposing "Star Wars," and conducting peacemaking education programs in schools that NJPA had pursued long before the war and which it hopes to be able to pursue again some day. In addition, NJPA and its members were injured by being deprived of the opportunity to vote for or against their elected representatives based upon how their representatives voted on the issue of going to war in Iraq, and, in the case of NJPA's members and contributors, by being compelled to pay tax dollars for an unconstitutional war that they oppose.

9. PLAINTIFF PAULA ROGOVIN is a citizen of the United States and the State of New Jersey. She resides in Teaneck and is the spokesperson for the Bergen County Chapter of Military Families Speak Out. She has a son in the United States Marine Corps, who has just completed his second tour of duty in Iraq. She is a registered voter in the 9th Congressional District of New Jersey, and voted in the 2002 and 2004 Congressional Elections, wherein she was deprived of the opportunity to vote for or against her elected representatives based upon how they voted on the

issue of going to war in Iraq since there was never a vote on an explicit Congressional Declaration of War.

10. The fact that no Declaration of War against Iraq was ever brought to a vote in Congress in violation of due process requirements has directly caused injury to Paula Rogovin by, among other things, directly causing her to suffer emotional, physical and psychological injury for which she has received medical and pharmacological treatment arising from her concern for the safety of her son, and the children of the many other families she knows, her great anger at the President's blatant violations of the Constitution and other laws in initiating and

pursuing the war, and the stress arising therefrom. Prior to the unconstitutional initiation of the Iraq War Paula Rogovin had long been active in local politics, a field of endeavor that she has had to abandon in order to pursue her activism in opposition to the war. Thus, she has paid a great "opportunity cost" whereby she has been compelled to redirect her time and financial resources to opposition to the war and has thereby been deprived of the ability to devote those resources to such other projects as local political activism and working on new books for publication in the field of education that she had pursued long before the war and which she hopes to pursue again some day. In addition, Paula Rogovin was injured by being deprived of the opportunity to vote for or against her elected representatives

based upon how they voted on the issue of going to war in Iraq and by being compelled to pay tax

dollars for an unconstitutional war that she opposes.

11. PLAINTIFF ANNA BERLINRUT is a citizen of the United States and the State of New Jersey. She resides in Maplewood, and is the spokesperson for the Essex County Chapter of Military Families Speak Out. She has a son serving in the United States Marine Forces Reserve who has already served two tours of duty in Iraq, and is scheduled to be redeployed there this September. She is a registered voter in the 10th Congressional District, and voted in the 2002 and 2004 Congressional Elections, wherein she was deprived of the opportunity to vote for or against her elected representatives based upon how they voted on the issue of going to war in Iraq since there was never a vote on a Congressional Declaration of War.

12. The fact that no declaration of war against Iraq was ever brought to a vote in Congress in violation of due process requirements has directly caused injury to Anna Berlinrut by, among other things, directly causing her to suffer emotional, physical and psychological injury for which she has received medical and pharmacological treatment arising from her concern for the safety of her son, and the children of the many other families she knows, her great anger at the President's blatant violations of the Constitution and other laws in initiating and pursuing the war and the stress arising therefrom. Her performance at work has suffered as a result of these injuries. Prior to the unconstitutional initiation of the Iraq War Anna Berlinrut devoted a great deal of time to gardening and she was

planning to fix up her house in order to prepare it for sale. She has had to abandon these activities due to the great amount of time she now devotes to activism in opposition to the war. Thus, she has paid a great "opportunity cost" whereby she has been compelled to redirect her time and financial resources to opposition to the war and has thereby been deprived of the ability to devote those resources to such other projects as she had long pursued before the war and which she hopes to pursue again some day. In addition, Anna Berlinrut was injured by being deprived of the opportunity to vote for or against her elected representatives based upon how they voted on the issue of going to war in Iraq and by being compelled to pay tax dollars for an unconstitutional war that she opposes.

13. PLAINTIFF WILLIAM JOSEPH WHEELER is a citizen of the United States and resides in Windsor, California. He served in the United States Army from May 23, 2001 until his Honorable Discharge on January 5, 2004, as a result of a "physical condition not a disability." He is subject to recall to active duty until May 2009. He served in Iraq from March 2003 to November 2003. He was part of the 240th Forward Surgical Team attached to the Fourth Infantry Division, with the rank of E-4, also known as Specialist. He was the recipient of the following decorations, medals and citations: Presidential Unit Citation (Army); Army Good Conduct Medal; National Defense Service Medal; Armed Forces Expeditionary Medal; Army Service Ribbon; and Army Lapel Button.

14. As an active-duty soldier, William Joseph Wheeler was directly affected and harmed by the President's unconstitutional orders initiating and pursuing the War in Iraq. Along with the rest of the 240th Forward Surgical Team he was ordered to go to Kuwait and to then invade and occupy Iraq. He was among the first United States troops establishing control over the Tikrit airfield. During his time in Iraq he was directly exposed to hostile sniper fire and mortar rounds. For a significant period of time, his camp received hostile incoming mortar attacks on a nightly basis. The "physical condition not a disability" that led to his Honorable Discharge, and from which he still suffers, was caused by his service in Iraq. But for the unconstitutional actions of the President in connection with the War in Iraq, William Joseph Wheeler would not have had to endure the many emotional, psychological and physical affects arising from the ordeal of combat, the continuing affects of which still plague him.

15. William Joseph Wheeler, as a member of the Army and as an honorably discharged veteran still subject to recall, has a due process right to insist that all of the orders that he is required to obey are lawfully given. See 10 U.S.C. §§ 890, 891 & 892; U.S.C.M.J. Arts. 90, 91 & 92. A soldier who unquestioningly follows unlawful orders may find himself subject to criminal or other sanctions in military or civilian courts or even in the courts of other nations or of international forums such as the Hague. William Joseph Wheeler therefor suffered injury by being compelled to obey orders that were unlawful because they were premised on the

President's unconstitutional initiation of the War in Iraq without a Congressional Declaration of War. He is also subject to future injury if he receives an order recalling him to active duty as a result of the Iraq War or of the initiation of another war in Iran or elsewhere in the absence of a Congressional Declaration of War.

16. DEFENDANT GEORGE W. BUSH is the president of the United States. He is sued in his official capacity.

STATEMENT OF FACTS

17. On March 17, 2003, in a televised speech, President George W. Bush gave Saddam Hussein 48 hours to go into exile or face war. Saddam Hussein rejected the exile option the following day on March 18, 2003.

18. On March 19, 2003, President Bush commenced war on the sovereign country of Iraq and ordered United States armed forces to commence armed hostilities with the avowed aim of achieving "regime change" in that country. Plaintiff William Joseph Wheeler was one of the soldiers directly affected and placed in harm's way by the President's order. Iraq had not attacked the United States and posed no imminent threat to the territory of the United States. President Bush stated that he was acting pursuant to an Authorization for Use of Military Force Against Iraq (AUMF) passed by Congress more than five months earlier on October 10, 2002.

19. On March 20, 2003, the war against Iraq began at 5:30 AM Baghdad time (9:30 PM EST,

March 19, 2003), when the United States launched Operation Iraqi Freedom. Called a "decapitation attack," the initial air strike of the war attempted to target Saddam Hussein and other Iraqi leaders.

20. On March 21, 2003, the major phase of the war began with heavy aerial attacks on Baghdad and other cities. The campaign was publicized in advance by the Pentagon as an overwhelming barrage meant to instill "shock and awe."

21. The United States has continued to conduct military operations in Iraq to the present time, even though the regime of Saddam Hussein has been overthrown, Hussein executed and a constitutional government elected. More than 4,000 U. S. military personnel have died in Iraq to date as well as tens of thousands of Iraqi citizens who have died as a result of U.S. military operations.

22. In January 2007, President Bush ordered an additional 30,000 troops deployed to Iraq.

23. As of the date of this Amended Complaint, the War in Iraq continues.

24. There has never been a Declaration of War by Congress against Iraq.

25. There has never been a judicial decision that Citizens of the United States have no right under the Constitution to have each member of Congress vote on the record his or her position on taking the nation to war.

Adoption of Article I, Section 8

26. Article I, Section 8 of the United States Constitution grants to Congress the power to

"declare war." Article II, Section 2 designates the President as Commander in Chief of the Army and Navy.

27. The debates at the Constitutional Convention establish that the Framers feared a powerful executive with war-making powers. When the Continental Congress made the beloved and respected George Washington Commander-in-Chief in 1775, with "full power and authority to act as you shall think for the good and welfare of the service," it also directed him "punctually to observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of these United States, or committee of Congress."

28. In January, 1776, Tom Paine's pamphlet *Common Sense* helped convince the Colonists that Kings were enemies of self-government who conducted wars of personal ambition at the expense of their subjects' lives and treasures. Paine denounced "the corrupt influence of the Crown [that] hath ... swallowed up the power and eaten out the virtue of the House of Commons. . . . In England, a King hath little more to do than make war and give away places, which, in plain terms, is to impoverish the nation . . . ."

29. On July 4, 1776, the Declaration of Independence proclaimed that the King "has abdicated government here by declaring us out of his Protection and waging War against us."

30. The Articles of Confederation, written in 1777, which became effective in 1781, created a weak federal government without king or president. The Continental Congress had the power

of "determining on peace and war," but only if at least nine of the thirteen states agreed.

31. The Constitutional Convention was convened in May, 1787 to remedy weakness in the Articles of Confederation. On June 1, the Convention discussed whether the Executive to be created should be a single person or a three-person body. All of the participants in the discussion -- delegates Charles Pinkney, John Rutledge, Roger Sherman, James Madison and James Wilson -- insisted that the Executive was not to have the prerogatives of the British Crown to declare war. There was no dissent. Conforming to their conclusion, the Committee on Detail reported on August 6 that only Congress should have the power to "make war."

32. On August 11, the principle of transparency, moved by James Madison and John Rutledge, was written into the Constitution in what was to become Article I, Sec. 5(3): "Each House shall keep journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the journal." The secrecy exception can have no application to "Declarations of War," since 'declarations' are by nature public documents.

33. The discussion of transparency made it clear that the issue of war was a public matter to be debated by the nation, with each representative's vote publicly recorded, not decided in executive chambers. James Wilson of

Pennsylvania summed up the debate that led to this requirement as follows: "The people have a right to know what their agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings."

34. One week later, on August 17, the second Convention debate over the War Powers occurred. The proceedings, as recorded by James Madison, reveal that only one of the 55 delegates, Pierce Butler of South Carolina, argued that the President should have the power to declare war. Elbridge Gerry of Massachusetts responded that he "never expected to hear in a republic a motion to empower the executive alone to declare war." Butler's proposal was dropped without any vote. The only change to the Committee's recommendation that Congress should have the power to "make war" was to amend "make" to "declare." This was to assure that the Executive had the power to repel sudden attacks, but did not give the president power to wage undeclared hostilities.

35. The Framers deliberately chose to locate the war-initiating power in the most representative branch of government. They recognized that there is always much at stake in war: the lives of the people and the well-being of the nation. They had seen these squandered too easily and too quickly by kings, and they wanted to make the process through which the nation could become immersed in war difficult and cumbersome. Despite arguments of some that greater efficiency would attach to locating the power in the Senate alone, they allocated the power to Congress as a whole,

including the House of Representatives, the body elected directly by the people. The purpose, according to Thomas Jefferson, was to place "an effectual check to the dog of war." The chain that would restrain the "dog of war" was the caution that would be shown by legislators because their constituents might vote them out of office at the next election.

36. There was in the Convention no doubt about the limited scope of the president's war power. The duty to repel sudden attacks represents an emergency measure that permits the president to take actions necessary to protect the United States in situations allowing no time for congressional deliberation. The President was never vested with a general power to deploy troops whenever and wherever he thought best, and the Framers did not authorize him to take the country into a full-scale war or to mount an offensive attack against another nation

37. In Federalist No. 69, Alexander Hamilton, a strong advocate of Executive power, wrote that the President's power as Commander-in-Chief would be "much inferior" to that of the King, amounting to "nothing more than the supreme command and direction of the military and naval forces." In Federalist No. 26, Hamilton wrote: "The Legislature . . . will be OBLIGED . . . to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; *and to declare their sense of the matter by a formal vote in the face of their constituents.*" (Emph. Added)

38. In a letter to Thomas Jefferson dated April 2, 1789, James Madison wrote: "The

Constitution supposes, what the History of all government demonstrates, that the Executive is the branch of power most interested in war and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature."

39. Throughout the Nineteenth Century, the Supreme Court rigorously carried out the Founders' intent to limit the president's power to make war in cases such as Bas v. Tingy, 4 U.S. 37 (1800), and The Prize Cases, 2 Black (67 U.S.) 635 (1863). In Bas, the Court distinguished between "imperfect" or limited wars and "perfect" or all-out wars against sovereign nations. The latter situation required a Congressional Declaration.

40. In the *Steel Seizure Case* of 1952, Justice Robert Jackson noted that the Commander-in-Chief Clause is sometimes put forth "as support for any Presidential action, internal or external, involving use of force, the idea being that it vests power to do anything, anywhere, that can be done with army or navy." To this proposition, he said that nothing would be more "sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."

Authorization for Use of Military Force Against Iraq Resolution of 2002 ("AUMF")

41. The Authorization for Use of Military Force Against Iraq Resolution of 2002, Public Law 107-243, House Joint Resolution 114 (the "AUMF")

was signed into law by President Bush on October 16, 2002.

42. Pursuant to the "Authorization" section, subsection 3(a), of the AUMF, "The President is authorized to use the Armed Forces of the United States *as he determines to be necessary and appropriate* in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq." (Emphasis Supplied.) It included no limits to duration or manner or place and no sunset provision.

43. The AUMF cannot be considered a Declaration of War for the following reasons:

A. A Declaration of War must emanate from Congress. That was the procedure the Framers contemplated to control presidential ambition. The President interpreted the AUMF to transfer the power to commence war to the President; this was a clear violation of the language and intention of the Framers.

B. The people have a right to know how each representative voted on the issue of going to war. The citizens were the beneficiaries of the requirement that each legislator place his or her vote on the record of the Congress.

C. The principle vice of the AUMF is that it denied the people knowledge of how representatives voted on war, because their representatives never cast a vote clearly and

solely on the issue of going to war. As subsequent events demonstrated, the procedure allowed members of Congress who voted for the AUMF to disclaim any responsibility for the decision to go to war with Iraq. Thus, the American People were deprived of the opportunity to vote for or against their elected representatives based upon how each representative voted on the issue of going to war in Iraq.

D. An additional vice of the 2002 AUMF is its vagueness. It gave the President room to assume unlimited discretion to attack Iraq. (The President did not exercise that power for almost six months.) Because of this vagueness, the AUMF cannot be likened to a Declaration of War which is – in our history – a straight-forward statement. This same vagueness violates the specificity requirement of the War Powers Resolution of 1973, 50 U.S.C. §§ 1541 *et seq.*, which was intended to avoid exactly the situation created by the AUMF of October 2002.

E. In sum, the AUMF cannot be considered a Declaration of War because to do so would be to grant Congress the right to delegate its duty to determine whether or not war should be declared to the President and Article I, Section 8 of the United States Constitution does not permit any such delegation of this exclusive legislative power.

44. As a result of the foregoing, the 2002 AUMF is unconstitutional for the following reasons:

A. The AUMF is inconsistent with Article I, Sec. 8 in that it shifts a responsibility the Constitution assigns exclusively to Congress to another branch of government.

B. It is not a Declaration of anything. In giving the President authority to make the determination to "use" the military, it does not compel him to do anything.

C. It denied the voters the right to evaluate how their member of Congress voted on going to war, a right guaranteed by Article I, Sec. 5(3), as implemented by the Due Process Clause of the Fifth Amendment.

45. In U.S. history, a straight-forward declaration of all-out war is exemplified by the 1941 Declaration of War against Japan, as follows: ". . . That the state of war between the United States and the Imperial Government of Japan . . . is hereby formally declared; and that the President be, and he is hereby authorized, and directed to employ the entire naval and military forces of the United States and the resources of the government to carry on war against the Imperial Government of Japan; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States."

46. In the alternative, Congress could adopt a clearly understandable limit on the time, place

and manner of a limited war, as in the quasi-war against France in 1798, as follows: "That the President of the United States shall be, and is hereby authorized to instruct the commanders of the public armed vessels which are, or which shall be employed in the armed service of the United States, to subdue, seize and take, any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas, and such captured vessel, with her apparel, guns and appurtenances, and the goods or effects which shall be found on board the same, being French property, shall be brought within some port of the United States, and shall be duly proceeded against and condemned as forfeited. . . . And be it further enacted, That this act shall continue and be in force until the end of the next session of Congress and no longer." 1 U.S. Stat. 565.

The Threat to Attack Iran

47. The U.S. Executive appears headed down the road towards another unauthorized war – this time with Iran. In response to Iran's pursuit of nuclear weapons, President Bush has stated that "We will confront this danger before it is too late." John Bolton, the United States' Ambassador to the United Nations from 2005 to 2006 stated that President Bush "has said repeatedly that it is unacceptable for Iran to have nuclear weapons, and if he means unacceptable, then I assume he would take military action if he had to."

48. On October 1, 2007, the United States Senate approved a non-binding resolution (H.R.

1585) stating "that United States should designate the Islamic Revolutionary Guards Corps as a foreign terrorist organization." According to Senator Jim Webb of Virginia, some members of the Senate are concerned that such a designation could be seen by the president as "a de facto authorization for use of military force against Iran."

49. As recently as April 2008, General David Petreaus, commander of U.S. forces in Iraq, and Ryan Crocker, U.S. Ambassador to Iraq, testified to Congress that Iran had been fueling fighting and supplying arms to insurgents in Iraq. That testimony lays the foundation for a possible Presidential request for an Authorization to Use Military Force Against Iran (AUMF), which might precipitate a new war against the sovereign nation of Iran without a Congressional declaration.

50. The Washington Post reported as follows on April 25, 2008:

> The nation's top military officer said yesterday that the Pentagon is planning for "potential military courses of action" as one of several options against Iran, criticizing what he called the Tehran government's "increasingly lethal and malign influence" in Iraq. Adm. Michael Mullen, chairman of the Joint Chiefs of Staff, said a conflict with Iran would be "extremely stressing" but not impossible for U.S. forces, pointing to reserve capabilities in the Navy and Air Force.

51. Without a clear judicial determination of what constitutes a proper authorization for war, the U.S. is at risk of another military conflict without Congress' fully considering the risks and rewards of such action, and without a guarantee of public electoral accountability for each and every Congressional representative.

52. William Joseph Wheeler, an honorably discharged veteran who remains subject to an order recalling him to active duty, may be unconstitutionally ordered to return to active duty due to the initiation of a War against Iran or the continuation of the War in Iraq, in violation of his statutory and due process rights to only be asked to obey lawful and constitutional orders.

53. Recent events and statements by the President and other members of the executive branch demonstrate that Iran is not the only nation that may soon be invaded or attacked by order of the President without a Congressional Declaration of War. In particular, such possibilities plainly exist with regard to the Republic of Georgia and Pakistan.

CAUSE OF ACTION

54. President Bush's authorization of an offensive military strike against the nation of Iraq violated Article I, Section 8 of the United States Constitution, which assigns exclusively to Congress the duty to Declare War.

55. The principle of Separation of Powers prohibits the Congress from transferring its war powers to the President.

56. The Constitution requires that Congress declare war in a manner clearly understandable by the legislators and by the public. The vagueness of the AUMF violated the Fifth Amendment rights of voters to know their representatives' positions on going to war.

57. The President has no authority to conduct military operations except in response to a sudden attack, other than that lawfully provided by Congress through an all-out Declaration of War, or in an explicit authorization of limited military action. The open-ended October 2002 AUMF does not qualify because it is neither. Nor does it satisfy the specificity requirement of the War Powers Resolution of 1973. 50 U.S.C. §§ 1541 *et seq.*

58. Article 1, Section 5(3) of the Constitution together with the Due Process Clause of the Fifth Amendment guarantees to every American that the lives of their service men and women and their national treasure and the very fabric of their society will not be exposed to the great risks of war except in full and unambiguous compliance with the Constitutionally mandated procedure of having Congress formally Declare War.

59. Article 1, Section 5(3) of the Constitution together with the Due Process Clause of the Fifth Amendment guarantees to every American the right to know how his or her Congressional representatives voted on the issue of taking the nation to War and to cast their votes accordingly, thereby making every representative directly accountable to his or her constituents.

60. The continuing War in Iraq without a Congressional Declaration of War violates the United States Constitution.

61. As set forth more fully above in paragraphs 7 - 15 of this Amended Complaint, the plaintiffs have all suffered injury that has been proximately caused by the aforesaid violations of the United States Constitution.

62. As set forth more fully above in paragraphs 47 - 53 of this Amended Complaint, the plaintiffs all have a reasonable basis to fear that they will soon suffer further injury due to a repetition of the same or similar conduct by the President in the near future unless this Court declares that such conduct is unconstitutional in the absence of a formal and unambiguous Declaration of War by Congress.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court enter an Order as follows:

(a) Declare that the President's order of March 2003 to invade the sovereign nation of Iraq, in the absence of a Congressional Declaration of War, violated Article I, Sec. 8 of the United States Constitution and the Due Process Clause of the Fifth Amendment;

(b) Award Plaintiffs their costs and reasonable attorneys fees;

(c) Grant such other relief as may be just and proper.

Date: September 8, 2008

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Authorization for Use of Military Force Against Iraq Resolution of 2002, H.J. Res. 114, 107th Congress (2d Sess. 2002)

Joint Resolution

To authorize the use of United States Armed Forces against Iraq.

Whereas in 1990 in response to Iraq's war of aggression against and illegal occupation of Kuwait, the United States forged a coalition of nations to liberate Kuwait and its people in order to defend the national security of the United States and enforce United Nations Security Council resolutions relating to Iraq;

Whereas after the liberation of Kuwait in 1991, Iraq entered into a United Nations sponsored cease-fire agreement pursuant to which Iraq unequivocally agreed, among other things, to eliminate its nuclear, biological, and chemical weapons programs and the means to deliver and develop them, and to end its support for international terrorism;

Whereas the efforts of international weapons inspectors, United States intelligence agencies, and Iraqi defectors led to the discovery that Iraq had large stockpiles of chemical weapons and a large scale biological weapons program, and that Iraq had an advanced nuclear weapons development program that was much closer to producing a

nuclear weapon than intelligence reporting had previously indicated;

Whereas Iraq, in direct and flagrant violation of the cease-fire, attempted to thwart the efforts of weapons inspectors to identify and destroy Iraq's weapons of mass destruction stockpiles and development capabilities, which finally resulted in the withdrawal of inspectors from Iraq on October 31, 1998;

Whereas in Public Law 105-235 (August 14, 1998), Congress concluded that Iraq's continuing weapons of mass destruction programs threatened vital United States interests and international peace and security, declared Iraq to be in "material and unacceptable breach of its international obligations" and urged the President "to take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance with its international obligations";

Whereas Iraq both poses a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region and remains in material and unacceptable breach of its international obligations by, among other things, continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations;

Whereas Iraq persists in violating resolution of the United Nations Security Council by continuing to engage in brutal repression of its civilian population thereby threatening international peace and security in the region, by refusing to release, repatriate, or account for non-Iraqi citizens wrongfully detained by Iraq, including an American serviceman, and by failing to return property wrongfully seized by Iraq from Kuwait;

Whereas the current Iraqi regime has demonstrated its capability and willingness to use weapons of mass destruction against other nations and its own people;

Whereas the current Iraqi regime has demonstrated its continuing hostility toward, and willingness to attack, the United States, including by attempting in 1993 to assassinate former President Bush and by firing on many thousands of occasions on United States and Coalition Armed Forces engaged in enforcing the resolutions of the United Nations Security Council;

Whereas members of al Qaida, an organization bearing responsibility for attacks on the United States, its citizens, and interests, including the attacks that occurred on September 11, 2001, are known to be in Iraq;

Whereas Iraq continues to aid and harbor other international terrorist organizations, including organizations that threaten the lives and safety of United States citizens;

Whereas the attacks on the United States of September 11, 2001, underscored the gravity of the threat posed by the acquisition of weapons of mass destruction by international terrorist organizations;

Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself;

Whereas United Nations Security Council Resolution 678 (1990) authorizes the use of all necessary means to enforce United Nations Security Council Resolution 660 (1990) and subsequent relevant resolutions and to compel Iraq to cease certain activities that threaten international peace and security, including the development of weapons of mass destruction and refusal or obstruction of United Nations weapons inspections in violation of United Nations Security Council Resolution 687 (1991), repression of its civilian population in violation of United Nations Security Council Resolution 688 (1991), and threatening its neighbors or United Nations operations in Iraq in violation of United Nations Security Council Resolution 949 (1994);

Whereas in the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1), Congress has authorized the President "to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolution 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677";

Whereas in December 1991, Congress expressed its sense that it "supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 687 as being consistent with the Authorization of Use of Military Force Against Iraq Resolution (Public Law 102-1)," that Iraq's repression of its civilian population violates United Nations Security Council Resolution 688 and "constitutes a continuing threat to the peace, security, and stability of the Persian Gulf region," and that Congress, "supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 688";

Whereas the Iraq Liberation Act of 1998 (Public Law 105-338) expressed the sense of Congress that it should be the policy of the United States to support efforts to remove from power the current Iraqi regime and promote the emergence of a democratic government to replace that regime;

Whereas on September 12, 2002, President Bush committed the United States to "work with the United Nations Security Council to meet our common challenge" posed by Iraq and to "work for

the necessary resolutions," while also making clear that "the Security Council resolutions will be enforced, and the just demands of peace and security will be met, or action will be unavoidable";

Whereas the United States is determined to prosecute the war on terrorism and Iraq's ongoing support for international terrorist groups combined with its development of weapons of mass destruction in direct violation of its obligations under the 1991 cease-fire and other United Nations Security Council resolutions make clear that it is in the national security interests of the United States and in furtherance of the war on terrorism that all relevant United Nations Security Council resolutions be enforced, including through the use of force if necessary;

Whereas Congress has taken steps to pursue vigorously the war on terrorism through the provision of authorities and funding requested by the President to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

Whereas the President and Congress are determined to continue to take all appropriate actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that

occurred on September 11, 2001, or harbored such persons or organizations;

Whereas the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States, as Congress recognized in the joint resolution on Authorization for Use of Military Force (Public Law 107-40); and

Whereas it is in the national security interests of the United States to restore international peace and security to the Persian Gulf region: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force Against Iraq Resolution of 2002".

SEC. 2. SUPPORT FOR UNITED STATES DIPLOMATIC EFFORTS.

The Congress of the United States supports the efforts by the President to--

(1) strictly enforce through the United Nations Security Council all relevant Security Council resolutions regarding Iraq and encourages him in

those efforts; and

(2) obtain prompt and decisive action by the Security Council to ensure that Iraq abandons its strategy of delay, evasion and noncompliance and promptly and strictly complies with all relevant Security Council resolutions regarding Iraq.

SEC. 3. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) Authorization.--The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to--

(1) defend the national security of the United States against the continuing threat posed by Iraq; and

(2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

(b) Presidential Determination.--In connection with the exercise of the authority granted in subsection (a) to use force the President shall, prior to such exercise or as soon thereafter as may be feasible, but no later than 48 hours after exercising such authority, make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that--

(1) reliance by the United States on further diplomatic or other peaceful means alone either (A)

will not adequately protect the national security of the United States against the continuing threat posed by Iraq or (B) is not likely to lead to enforcement of all relevant United Nations Security Council resolutions regarding Iraq; and

(2) acting pursuant to this joint resolution is consistent with the United States and other countries continuing to take the necessary actions against international terrorist and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001.

(c) War Powers Resolution Requirements.--

(1) Specific statutory authorization.-- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) Applicability of other requirements.-- Nothing in this joint resolution supersedes any requirement of the War Powers Resolution.

SEC. 4. REPORTS TO CONGRESS.

(a) Reports.--The President shall, at least once every 60 days, submit to the Congress a report on matters relevant to this joint resolution, including actions taken pursuant to the exercise of authority

granted in section 3 and the status of planning for efforts that are expected to be required after such actions are completed, including those actions described in section 7 of the Iraq Liberation Act of 1998 (Public Law 105-338).

(b) Single Consolidated Report.--To the extent that the submission of any report described in subsection (a) coincides with the submission of any other report on matters relevant to this joint resolution otherwise required to be submitted to Congress pursuant to the reporting requirements of the War Powers Resolution (Public Law 93-148), all such reports may be submitted as a single consolidated report to the Congress.

(c) Rule of Construction.--To the extent that the information required by section 3 of the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1) is included in the report required by this section, such report shall be considered as meeting the requirements of section 3 of such resolution.